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10 Permanente Welfare Benefit Plan

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 MARIE CHELLINO,

14 Plaintiff,

15 v.

16 KAISER FOUNDATION HEALTH
17 PLAN, INC., AND DOES 1-10,

18 Defendant.

CASE NO. C 07-03019 CRB

**DEFENDANTS' REPLY MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

DATE: MARCH 28, 2008

TIME: 10:00 A.M.

DEPT: 8

19
20 Defendants Kaiser Foundation Health Plan, Inc. ("KFHP") and Kaiser Permanente
21 Welfare Benefit Plan ("Plan") moved for summary judgment on the claims brought by plaintiff
22 Marie Chellino under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29
23 U.S.C. § 1001, *et seq.*, on the ground that the decision to terminate Plan benefits was not an
24 abuse of discretion, in light of the administrative record and the applicable law.

25 Benefits for long term disability ("LTD") were terminated effective August 16, 2006,
26 after (1) plaintiff was observed in surveillance videos over a period of 13 months (between May
27 2004 and June 2005) driving, shopping, carrying objects, walking, bending, pulling horses,
28 mounting horses, and riding horses, all without exhibiting pain behaviors; (2) an Independent

1 Medical Examination (“IME”) physician opined, after physically examining plaintiff and
2 reviewing her medical records, as well as the surveillance tapes, that she was not substantially
3 limited in her activities and that she was capable of being employed in a sedentary job; and (3) a
4 labor market survey identified suitable available jobs that she was capable of performing. The
5 termination of benefits was upheld on appeal, after an independent, Board-certified
6 rheumatologist opined that (1) the surveillance videos materially contradicted plaintiff’s
7 subjective reports of disability, (2) her treating physician’s statements regarding alleged disability
8 were internally inconsistent, and (3) the IME physician had accurately assessed plaintiff’s actual
9 functional capabilities.

10 The Plan granted full discretionary authority to Aetna Life Insurance Company (“Aetna”)
11 as the claim administrator for LTD benefits, and the termination of benefits was made pursuant
12 to such discretionary authority. Plaintiff’s opposition does not dispute that the Plan granted
13 discretionary authority to Aetna with regard to claim decisions, but argues that the decision was
14 improper and should be overturned. That argument is supported only by misstatements of the
15 administrative record, and name calling against the doctors who examined plaintiff or reviewed
16 and opined upon her records. Defendants’ responses to plaintiff’s substantive arguments are set
17 out in their opposition to plaintiff’s own summary judgment motion, and to avoid burdening the
18 record unnecessarily, will not be repeated here; rather, defendants refer the Court to that filing.

19 Plaintiff’s opposition consists primarily of continued insistence that her doctors’
20 credulous acceptance of her self-reported limitations similarly must be accepted by the Court at
21 face value, no matter what the evidence actually is. The evidence, however, is impossible to
22 reconcile with plaintiff’s portrayal of herself someone for whom everyday living is so difficult
23 that she cannot be expected to work at a sedentary job.

24 Indeed, given the strident tone of the opposition, it appears that not only did her former
25 counsel apparently not provide her current counsel with the complete record Aetna had sent him
26 (which included all of the videos of plaintiff’s outdoor activities – specifically including the
27 documentation of her ability to easily climb onto a high sawhorse in a single step, in order to then
28 lift herself into her saddle and go for a horseback ride), but even when her counsel received a

1 duplicate in the copy of the administrative record provided to him in the course of the litigation,
2 he seems not to have watched it and considered its implications. Whether that particular video
3 was or was not included in the courtesy copy of the administrative record that he received after
4 taking over the representation of plaintiff, her treating doctor had it and her former counsel had it
5 and as of the initial disclosures in this case, current counsel had it – yet plaintiff still insists that
6 no one could review it and conclude in good faith that plaintiff has the strength to work at a
7 sedentary job.

8 Plaintiff's off-hand reference to the possibility of conducting discovery before the Court
9 rules on the motions should be rejected. There is no need for discovery in order to resolve the
10 question of whether it was an abuse of discretion for Aetna to determine that, on all of the
11 evidence, plaintiff no longer met the Plan's definition of "disabled."

12 Moreover, it appears that plaintiff's aim in seeking discovery will be to try to discredit the
13 merits of the decision – that is, to question how and why the reviewing doctors reached the
14 opinions they did. That is not a proper subject for discovery, according to courts that have
15 addressed the question. *See, e.g., Ford v. Motorola Inc. Involuntary Severance Plan*,
16 2007 WL 162680 (D. Az. 2007), at *7 n.2 ("The Court, having considered the inherent conflict
17 of interest . . . finds that additional discovery is not necessary"); *Shemano-Krupp v. Mutual of*
18 *Omaha Ins. Co.*, 2006 WL 3365595 (N.D. Cal. 2006), at *9 ("Plaintiff requests discovery to
19 uncover the extent of other possible conflicts. . . . Plaintiff's request to take additional discovery
20 is DENIED.").

21 Here, plaintiff has not specifically identified what discovery she would seek, but vaguely
22 mentions "depositions of doctors" without any real explanation. The clearest articulation of the
23 fallacy of her position is found in *Harper v. Unum Life Ins. Co.*, 2007 WL 1792004 (E.D. Cal.
24 2007), where the plaintiff sought depositions of claim analysts and medical personnel. *Id.* at *2.
25 In rejecting the argument that she had a right to conduct such discovery, the district court ruled:

26 Defendant argues, and this Court agrees, that the depositions
27 Plaintiff seeks are not related to conflict of interest, but rather seek
28 information related to a challenge to the decision made by
Defendant. Plaintiff argues that the discovery is related to a
conflict of interest because it will reveal that Defendant and its
employees ignored and/or contradicted evidence specifically to

1 deny Plaintiff's claim for benefits. Plaintiff's reasoning, though,
 2 misunderstands the distinction between conflict of interest
 3 discovery and discovery on the merits of her claim. Despite her
 4 belief, the discovery Plaintiff seeks goes *directly* to the reasoning
 5 behind the denial. . . . Under the abuse of discretion standard
 applicable to this case, however, the administrative record stands
 on its own, meaning that the case will be evaluated solely on the
 information contained within it. This renders the motivations and
 thought processes behind the actions of little use to the Court.

6 *Id.* at *5 (emphasis in original).¹

7 At the end of the day, the question for this Court is whether, given all of the multitude of
 8 evidence in the administrative record, the decision to terminate LTD benefits was an abuse of
 9 discretion. In a very recent opinion, the Fourth Circuit provides an especially instructive
 10 explanation of the court's role where the ERISA plan in question grants the administrator
 11 discretionary authority:
 12

13 Under no formulation, however, may a court, faced with
 14 discretionary language like that in the plan instrument in
 15 this case, forget its duty of deference and its secondary
 16 rather than primary role in determining a claimant's right
 17 to benefits. The abuse of discretion standard in ERISA
 18 cases protects important values: the plan administrator's
 19 greater experience and familiarity with plan terms and
 20 provisions; the enhanced prospects of achieving consistent
 application of those terms and provisions that results; the
 desire of those who establish ERISA plans to preserve at
 least some role in their administration; and the importance
 of ensuring that funds which are not unlimited go to those
 who, according to the terms of the plan, are truly deserving.
 Thus, the language of discretion in an ERISA plan is a
 message to courts, counseling not judicial abdication, to be
 sure, but a healthy measure of judicial restraint.

21 Evans v. Eaton Corporation Long Term Disability Plan, 514 F.3d 315, at 323 (4th Cir. 2008)
 22 [internal citations omitted].
 23

24 ¹ As *Harper* held, discovery aimed at the merits of reviewing doctors' opinions – that is, why
 25 they reached the conclusions they did and on what basis – is not “conflict” discovery, and thus is
 26 not appropriate in any case, as review will be for abuse of discretion (and a fiduciary cannot be
 27 found, on the basis of information that was not before it, to have abused its discretion). Even
 28 when a court's review is *de novo*, however, a case will be decided on the basis of the
 administrative record, and discovery will be appropriate only when and to the extent that the
 reviewing court requires additional information in order to understand the administrative record.
 See *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 943-44 (9th
 Cir. 1995).

1 On the record in this case, there was no abuse of discretion, and defendants' motion for
2 summary judgment should be granted.

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4 DATED: March 14, 2008

SEDGWICK, DETERT, MORAN & ARNOLD LLP

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9 Permanente Welfare Benefit Plan
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